IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2008 Session

STATE OF TENNESSEE v. KENNETH B. NEVELS

Direct Appeal from the Circuit Court for Montgomery County
No. 40601153 Michael R. Jones, Judge

No. M2007-00902-CCA-R3-CD - Filed September 3, 2008

Defendant, Kenneth B. Nevels, entered a plea of guilty to one count of driving under the influence (DUI), first offense, and one count of driving on a suspended license, both Class A misdemeanors. The trial court sentenced Defendant to eleven months, twenty-nine days, for his DUI conviction, which sentence was to be suspended after serving forty-eight hours in confinement. Defendant was sentenced to a concurrent sentence of eleven months, twenty-nine days for his driving on a suspended license conviction, all of which was suspended with Defendant placed on probation. Pursuant to the plea agreement, Defendant reserved the right to appeal a certified question of law challenging the trial court's denial of his motion to suppress. After a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Roger Eric Nell, District Public Defender; and Rebecca F. Stevens, Assistant Public Defender, Clarksville, Tennessee, for the appellant Kenneth B. Nevels.

Robert E. Cooper, Jr., Attorney General and Reporter; Andrew Hamilton Smith, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Chris Dotson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

A hearing on Defendant's motion to suppress was heard on March 5, 2007, after which the trial court found that the sobriety roadblock at which Defendant was stopped complied with the requirements of State v. Downey, 945 S.W.2d 102 (Tenn. 1997). The parties submitted an approved

statement of the evidence in lieu of a transcript of the hearing on Defendant's motion to suppress pursuant to Tennessee Rule of Appellate Procedure 24(c). The statement provides as follows:

> Lt. Gary Hurst testified on direct that he was the "Site Supervisor" in the Clarksville Police Department, [("CPD")], for sobriety checkpoint operations. He testified that . . . he . . . kept up with traffic patterns, [and] researched and selected sites for setting up checkpoints. It was also his responsibility to issue press releases so that the public would be informed about checkpoints through the newspaper and other media. He also personally supervised the operation of the checkpoints. The checkpoint in question took place late April 22, 2006, on the 41-A Bypass (Ashland City Road).
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> The CPD Authorization Sheet ("Sheet") signed by [Deputy Chief Bob] Davis stated that the checkpoint would occur on 22 April 2006, from 2200 hours through 0100 hours, at [the] 41-A Bypass. Participating officers were responsible for following CPD General Order E-15 and were instructed to stop all vehicles, with no reference made to which lane or lanes of traffic were involved. The relevant General Orders were reviewed before the checkpoint at the 2200 hours briefing. Officers used marked units with emergency equipment, as well as flashlight cones, traffic cones, vests, and warning signs. Approaching traffic was afforded an opportunity to avoid the checkpoint, in a so-called "escape route." According to the Activity Log, the briefing occurred at 2200 hours; at 2300 hours all northbound traffic was stopped; at approximately 0010 hours Defendant was stopped; at 0030 hours both northbound and southbound traffic was stopped, and the checkpoint ended at 0130. [Lt.] Hurst would ensure press releases would be released so that the public \might be informed about checkpoints through the newspaper and other media. On April 17, 2006, CPD sent a notice to the Clarksville Leaf Chronicle ("Chronicle") that the checkpoint would occur on the 41-A Bypass in Clarksville, Tennessee on Saturday, April 22, 2006, from 11:00 p.m. (1100 hours) to 2:00 a.m. (0200 hours) [sic], to detect and deter impaired drivers. The Chronicle published said notice on 19 April 2006.
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> [Lt.] Hurst was present at the checkpoint and supervised its operation. At the site, while supervising, and without any further communication with headquarters or administrative personnel, [Lt.] Hurst made the decision to check both northbound and southbound [traffic] at approximately 0030 hours. [Lt.] Hurst based this decision on the volume of traffic involved. [Lt.] Hurst concluded that he lacked sufficient personnel to deal with stopping all cars in both directions when the checkpoint began. From 0030 until 0130, after the flow of traffic had decreased, [Lt.] Hurst felt more comfortable with stopping all traffic, northbound and southbound.
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> During the testimony of Lt. Hurst, the State introduced into evidence a media press release dated April 17, 2006; a notice of the checkpoint in question that appeared in the Clarksville "Leaf Chronicle" on April 19, 2006; an "Activity Log"

employed during the actual checkpoint operation on April 22, 2006; a "Tennessee Mobilization Activity Report" dated [April 24, 2006]; an "Activity Sheet" dated April 22, 2006; a copy of the Clarksville Police Department General [O]rder No. E-15, dated [January 1, 1992], which sets forth the Department's policy for "DUI Checkpoints."

On cross-examination, Lt. Hurst testified he had selected the site of this checkpoint "by researching the files," but could not be more specific as to the basis of his selection of this particular site.. He stated that this checkpoint resulted in only one DUI arrest, that of the instant case, out of 308 traffic stops.

Lt. Hurst further testified on cross[-examination] that he selected the site and prepared all related paperwork, which was then submitted to [Deputy] Chief Bob Davis for his approval or disapproval. [Deputy Chief] Davis and [Lt.] Hurst discuss[ed] the matter; [Deputy Chief] Davis approved it. [Lt. Hurst] also testified that while supervising the checkpoint site, he first stopped northbound traffic only and then, without any further communication with headquarters, he made the decision to check both northbound and southbound [traffic] at 0030 hours, less than halfway through the duration of the checkpoint.

The State called Deputy Chief of Police Bob Davis, who testified on direct [examination] that Lt. Hurst "kept up" with traffic patterns, and that he (Dep[uty] Chief Davis) signed the paperwork that [Lt.] Hurst presented to him. He could not say who actually decided on the particular location where this checkpoint took place. He said that the Clarksville Police Department relied on its own Order E-15, promulgated in 1992, as policy on checkpoints, and did not use Public Safety General Order 410 which is referenced in applicable case law.

At the conclusion of the suppression hearing, the trial court denied Defendant's motion, finding that the sobriety checkpoint was authorized by Deputy Chief Davis; Lt. Hurst's decision to stop checking all lanes of traffic was a "safety decision" described by the trial court as "neutral;" that the public were adequately advised of the checkpoint, both in the newspaper, and at the scene; that the checkpoint had adequate safety precautions; and that General Order E-15 complied with the requirements set forth in State v. Downey, including the fact that the traffic stops were "brief," and an escape route was provided.

II. Analysis

Pursuant to the plea agreement, Defendant properly preserved the following certified question of law: Whether the checkpoint at which [Defendant] was stopped and arrested was established and operated in violation of U.S. Const. amend. IV, Tenn. Const. Art. 1, §7; State v. Downey, 945 S.W.2d 102 (Tenn. 1997); State v. [Margie Lynn] Clark, No M2005-02001, [2006 WL 3044157] (Tenn. Crim. App., [at Nashville,] Oct. 20, 2006)[, no perm. to appeal filed]; and State v. Terry R.

McCulloch, No. E2003-01901-CCA-R3-CD, [2004 WL 1102410] (Tenn. Crim. App., at Knoxville, May 18, 2006)[, no perm. to appeal filed].

We review the trial court's denial of Defendant's motion to suppress by the following well-established standard:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court's application of law to the facts is reviewed de novo, with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000).

Both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution protect individuals against unreasonable searches and seizures. See U.S. Const. amend. IV; Tenn. Const. art. I, § 7. "These constitutional provisions are designed to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" State v. Keith, 978 S.W.2d 861, 865 (Tenn. 1998) (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930 (1967)). A search or seizure conducted without a warrant is presumed unreasonable, and evidence obtained as a result will be suppressed "unless the prosecution demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement." Keith, 978 S.W.2d at 865 (citations omitted). The stop of an automobile, even for the short duration involved in a driver's checkpoint, constitutes a seizure under both the United States and Tennessee Constitutions. See Whren v. United States, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 449-51, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412 (1990); Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660 (1979); Downey, 945 S.W.2d at 107. Thus, to be considered reasonable, the warrantless stop of an automobile must fall under one of the exceptions to the warrant requirement. These exceptions include roadblocks that are conducted "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979).

In Downey, our supreme court adopted the balancing test outlined in Sitz "as the appropriate constitutional standard, so that when a seizure occurs, an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field, and the seizure is carried out pursuant to a plan embodying explicit, neutral limitations on the

conduct of individual officers." Downey, 945 S.W.2d at 110. As applied to roadblocks, this test examines three factors: "(1) the gravity of the public concerns served by the roadblock; (2) the degree to which the roadblock advances the public interest; and (3) the severity of the roadblock's interference with an individual's liberty or privacy." State v. Hicks, 55 S.W.3d 515, 524 (Tenn. 2001) (citing Downey, 945 S.W.2d at 107-108).

A. Gravity of Public Concerns

Defendant argues that the Downey court did not relieve the State of the burden of establishing a compelling interest for sobriety roadblocks on a case by base basis. Rather, Defendant submits that the State must show that intoxicated drivers remain a problem of "grave public interest" in the county where the roadblock actually occurred in order for the roadblock to pass constitutional muster. Therefore, Defendant contends that the roadblock at which he was stopped violated the guidelines set forth in Downey because the State did not offer proof that intoxicated drivers were a highway safety concern in Montgomery County.

In Downey, the supreme court recognized "the State's compelling interest in detecting and deterring motorists who drive while under the influence of alcohol," stating that:

> [t]he statistics are overwhelming. As the court noted in Sitz, more deaths and injuries have resulted from such motor vehicle accidents on our nation's highways than from all the wars this country has fought. 496 U.S. at 456, 110 S. Ct. at 2488 (Blackmun, J., concurring). We, therefore, join the majority of jurisdictions who have concluded that the use of a sobriety roadblock may be used to advance the State's compelling interest provided it is established and operated in a manner that minimizes intrusion and limits discretion. In this regard, we observe that the criteria delineated in Loyd, Ingersoll, and Deskins provide the necessary framework for analysis.

Downey, 945 S.W.2d at 110.

The State's compelling interest in detecting and deterring intoxicated drivers has continued to be recognized by our courts. See State v. Hayes, 188 S.W.3d 505, 513-14 (Tenn. 2006); Hicks, 55 S.W.3d at 525. In Hicks, the supreme court explained:

> it is clear from the analysis of [Downey] that the State's interest in detecting and deterring drivers under the influence of alcohol was sufficiently compelling for three reasons: (1) the State's interest in maintaining the roadblock was directly tied to the ability of drivers to safely operate motor vehicles on the roads and highways of the state; (2) the harm sought to be eliminated by the roadblock was one that posed an imminent danger of death or serious bodily injury; and (3) the magnitude of the problem, coupled with its harm, was such that it commanded heightened action.

Hicks, 55 S.W.3d at 525. The Hicks court also observed that:

> [i]n support of the compelling nature of the interest at stake in Downey, we found that the State's interest in detecting and deterring drunk drivers was directly tied to highway safety because operation of vehicles while under the influence of alcohol had resulted in more deaths and injuries "than from all the wars this country has fought." In support of the sheer magnitude of the DUI problem, the Court noted the "overwhelming" statistical evidence of the problem, the fact that the legislature has increased the penalties for DUI "at nearly every session," and anecdotal evidence from daily newspaper and television accounts of the "carnage and tragedy" of drunk driving.

Id. at 526 n.2.

Defendant argues that societal concerns and problems change over time, and to say that "driving while intoxicated is always and forever of grave public interest just is not so." We agree with Defendant to the extent that the Downey court did not relieve the State of the burden of establishing a compelling State interest in maintaining a roadblock for purposes other than detecting and deterring intoxicated motorists. Hayes, 188 S.W.3d at 513-514 (applying the Downey analysis to identification checkpoints established to detect and deter unauthorized visitors to a public housing development); Hicks, 55 S.W.3d at 524 (applying the Downey analysis to a roadblock established to detect and deter unlicensed drivers). As the Hayes court observed, the type of roadblock examined in Hicks "did not have the benefit of overwhelming statistics, daily media reports, and repeated legislative action establishing the connection between unlicensed motorists and highway safety." Hayes, 188 S.W.3d at 514.

Defendant presents no evidence that the factors supporting the State's compelling interest as articulated in Downey has diminished or that Montgomery County is immune from the presence of intoxicated drivers. Based on our review, we conclude that the State had a compelling interest in maintaining the sobriety roadblock to detect and deter intoxicated drivers.

B. Effectiveness of Road Block

Defendant argues that the State did not establish that the roadblock advanced this interest. Defendant submits that out of 308 drivers stopped at the roadblock in Montgomery County, only one driver, himself, was charged with driving under the influence. Relying on State v. Terry R. McCulloch, Defendant contends that this statistic evidences the ineffectiveness of the roadblock.

In Terry R. McCulloch, the defendant was stopped at a driver's license roadblock and ultimately charged with driving under the influence and driving on a revoked license. Applying the holdings in Downey and Hicks, a panel of this Court found that the State had failed to establish that the presence of unlicensed drivers "sufficiently endangered the public so as to permit a roadblock." Terry R. McCulloch, 2004 WL 1102410, at *5. Further, the State failed to show that the roadblock resulted in the detection of any unlicensed driver other than the defendant and presented no testimony that any of the stopped vehicles had expired tags. Id. Based on these factors, coupled with

the fact that the roadblock was not conducted in accordance with Department of Safety General Administrative Order 410, we concluded that the roadblock violated the defendant's constitutional rights. Id. at *7.

In Downey, the supreme court concluded that it was "convinced that roadblocks are effective tools in advancing the State's interest in solving a serious public danger," and acknowledged that the court "should not determine which among reasonable law enforcement approaches is the most effective." Moreover, in Terry R. McCulloch, the fact that the roadblock did not detect more than one motorist driving without a license was but one factor in what ultimately was determined to be an unconstitutional roadblock. See Downey, 945 S.W.2d at 110 (concluding that "[n]ot every factor must weigh in favor of the State to uphold a given roadblock, nor is any single one dispositive of the issue").

Unlike the roadblock in Terry R. McCulloch, the Montgomery County roadblock was publicized in the local newspaper. Although the roadblock in the case sub judice ultimately resulted in only one arrest for driving under the influence, this fact does not take into account the other component of the State's interest in operating the roadblock, that is, deterring motorists from drinking and driving. Based on our review, we conclude that the first two prongs of the Downey analysis weigh in the State's favor.

C. Severity of Interference with Liberty

Defendant argues that the roadblock constituted an unconstitutional interference with his liberty because the operation of the roadblock was not in accordance with the guidelines set forth in Downey. Specifically, Defendant contends that Deputy Chief Davis merely signed the paperwork without making an independent decision as to where and how the roadblock was to be conducted, and that Lt. Hurst, therefore, made the decision to set up the roadblock and decided what procedures were to be used.

A particular roadblock cannot survive constitutional scrutiny "unless it is established and operated in accordance with predetermined operational guidelines and supervisory authority that minimize the risk of arbitrary intrusion on individuals and limit the discretion of law enforcement officers at the scene." Downey, 945 SW.2d at 104. The "characteristics of a roadblock that minimize the risk of arbitrary intrusion under Article I, section 7, include (1) stopping all cars traveling in both directions, unless congested traffic requires permitting motorists to pass through; (2) taking adequate safety precautions, such as warning approaching motorists of the roadblock and stopping cars only in a safe and visible area; (3) conducting the roadblock with uniformed officers and marked patrol cars with flashing emergency lights; and (4) providing advanced publicity of the roadblock to the public at large, separate from, and in addition to, any notice warnings given to approaching motorists." Hicks, 55 S.W.3d at 533 (citing Downey, 945 S.W.2d at 110-12). The Hicks court cautioned, however, that

> the most important attribute of a reasonable roadblock is the presence of genuine limitations upon the discretion of the officers in the field. Two facts are critical to finding that the officers' discretion on the scene was properly limited: (1) the decision to set up the roadblock in the first instance cannot have been made by the officer or officers actually establishing the checkpoint, and (2) the officers on the scene cannot decide for themselves the procedures to be used in operating the roadblock. In all cases, therefore, the State must show that some authority superior to the officers in the field decided to establish the roadblock, particularly as to its time and location, and that the officers adhered to neutral standards previously fixed by administrative decision or regulation. See Downey, [945 S.W.2d 110-112]. To be clear, these factors are so essential to a reasonable roadblock that the absence of either of them will necessarily result in the invalidation of the stops

Hicks, 55 S.W.3d at 533.

Lt. Hurst testified that it was his responsibility to research the selected site of a roadblock by reviewing traffic patterns. Lt. Hurst testified on cross-examination that he selected the site at which Defendant was stopped, prepared the paperwork, and submitted his selection to Deputy Chief Davis for his approval. Lt. Hurst said that he discussed the establishment and operation of the roadblock with Deputy Chief Davis who then authorized the roadblock.

The Clarksville Police Department's General Order E-15 directs that "[c]heckpoints will be set up only at the direction of the Chief of Police or his designee." The department's "Safety Inspection/D.U.I. Enforcement Checkpoints Authorization Sheet" was signed by Deputy Chief Davis on April 18, 2006, authorizing the establishment of a roadblock on the 41-A Bypass on April 22, 2005, between the hours of 10:00 p.m. and 1:00 a.m. The authorization sheet lists the actions which must be taken in connection with the roadblock – review of the department's guidelines, the use of marked units with activated emergency lights, prior notice to the public, and so forth. Each of the policy's requirements were checked and signed by Lt. Hurst on April 24, 2006, and reviewed by Deputy Chief Davis on April 25, 2006.

Defendant concludes from the evidence presented at the hearing that Deputy Chief Davis "merely rubber-stamped" Lt. Hurst's decision to operate the roadblock how, when, and where he wanted. The trial court, however, found that Deputy Chief Davis, as Lt. Hurst's superior officer, properly approved the date and time of the roadblock, and that the roadblock was conducted within the guidelines set forth in General Order E-15. After review, we conclude that the evidence does not preponderate against the trial court findings.

Defendant also contends on appeal that the State did not prove that Deputy Chief Davis was the Chief of Police's "designee" for the purpose of authorizing sobriety roadblocks. The State argues that Defendant has raised this issue for the first time on appeal and it is thus waived. See State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Waiver aside, we observe that Defendant does not contend that Deputy Chief Davis was not Lt. Hurst's superior officer, or that Deputy Chief

Davis lacked supervisory authority over the operation of the roadblock. Defendant is not entitled to relief on this issue.

General Order E-15 provides that roadblocks must be conducted in a systematic, non-random basis, and that each car will be approached and the driver informed of the purpose of the roadblock. The stop must "be of brief duration" and, if no signs of intoxication are detected, the driver "will be allowed to proceed." If the officer observes signs of intoxication, "the driver should be directed to the side for further investigation" and "out of the flow of traffic to avoid traffic hazards, congestion, and delays of those drivers following." Defendant does not contend that the officers failed to follow these procedures. Based on our review, we conclude that the level of intrusion to motorists at the sobriety roadblock was minimal and that the stopping of motorists at the road block was reasonable.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly denied Defendant's motion to suppress the evidence against him.

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THOMAS T. WOODALL, JUDGE